Supreme Court, U.S.
FILED
FEB 24 1992
OFFICE OF THE CLERK

No. 91-1226

In The

Supreme Court of the United States

October Term, 1991

J. O. DAVIS,

Petitioner,

v.

O. P. HOLLIS,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether, given the peculiar facts of this case, the Eleventh Circuit was correct in finding that Mr. Hollis had been prejudiced by his trial counsel's unreasonable error.

II.

Whether, given the state's failure to respond to Mr. Hollis' *pro se* petitions for post judgment relief, the Eleventh Circuit was correct in holding the state responsible for its inability to produce a trial transcript.

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OPINIONS BELOW

1. *Hollis v. Davis*, CA No. 87-H-0017-N, Recommendation of the Magistrate Judge (M.D. Ala. June 15, 1988) (State's Appendix C).

2. *Hollis v. Davis*, CA No. 87-H-0017-N, Order of the District Judge (M.D. Ala. July 14, 1988) (adopting without change the Magistrate's Recommendation).

3. *Hollis v. Davis*, No. 89-7477, 941 F.2d 1471 (11th Cir. September 18, 1991) (on petition for rehearing) (State's Appendix A).

CONSTITUTIONAL PROVISIONS

No person . . . shall be deprived of life, liberty, or property, without due process of law. . . .

U.S. Const. Amend. V.

In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. VI.

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1.

STATEMENT OF THE CASE

A. Proceedings Below.

In 1959, in rural, majority-black Bullock County, Alabama, O. P. Hollis, a black man, was indicted by an all-white grand jury, and convicted by an all-white petit jury, of first degree burglary against a white man. At that time, the possible sentence for first degree burglary ranged from ten years to death. Code of Ala. (1940) tit. 14, § 85. Mr. Hollis was sentenced to 99 years. A transcript of the trial does not exist.

Although he is uneducated and virtually illiterate, Mr. Hollis almost immediately began to seek post judgment relief *pro se*. He filed petitions for writs of error *coram nobis* – to which he received *no* judicial response – with the Circuit Court of Bullock County three times: in 1961 (2SR. 12-13[1]), 1966 (1SR. 60; 2SR. 13, *Recommendation*, AC 2), and 1984 (*Recommendation*, AC 3-4); *see generally*

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[1] Citations throughout this brief identify first the document, then the document number (for citations to the Record only), then the page number(s) to which reference is made:

Record vol. 1 = R1 – *(document number)* – *(page number(s))*, *e.g.* R1-6-7.

Record vol. 2 = R2 – *(document number)* – *(page number(s))*.

Transcript, 1st evidentiary hearing = 1SR. *(page number(s))*.

Transcript, 2nd evidentiary hearing = 2SR. *(page number(s))*.

Recommendation of the Magistrate, State Appendix C = *Recommendation*, AC *(page number(s))*.

Hollis v. Davis (No. 89-7477) (11th Cir. Sept. 18, 1991).

State Appendix A = *Hollis* AA. *(page numbers(s))*.

Hollis, AA 3-5). Further, in 1964 he moved the Bullock County Circuit Court – again without response – to provide him with a copy of his trial transcript. (1SR. 60; 2SR. 13, *Recommendation*, AC 11 n.5). Finally, in 1981, 1984, and 1987, he filed federal petitions for writ of habeas corpus. (*Recommendation*, AC 2-4). The first two petitions were dismissed for failure to exhaust; the third petition has occasioned this petition for writ of certiorari by the state of Alabama.

Counsel appointed to assist Mr. Hollis after he filed his third habeas corpus petition alleged, in an amended complaint, four grounds for habeas relief:

(1) ineffective assistance of counsel,

(2) denial of right to appeal,

(3) improper sentencing, and

(4) unconstitutionally composed grand and petit juries.

(*Recommendation*, AC 4-5). Following two evidentiary hearings,[2] (1SR, 2SR), the Magistrate Judge recommended that the first and second claims for relief be dismissed for Rule 9(a) reasons (*Recommendation*, AC 19-21), that the third be dismissed on substantive grounds (*id.*, 20-21), and, regarding the fourth, that although blacks had been

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[2] Preliminary to his analysis of Mr. Hollis' case, the Magistrate Judge determined that, although Mr. Hollis has failed to exhaust his state remedies, further attempts at state relief would be futile given the state's failure to respond to Mr. Hollis' petitions and to appoint counsel "in order to overcome the problem caused by [Mr. Hollis'] inscrutable handwriting." (*Recommendation*, AC 9).

unconstitutionally excluded from the grand jury, Mr. Hollis' claim was procedurally defaulted because it was not timely. (*Id.*, 15-19). Mr. Hollis filed objections to these recommendations, and to the Magistrate's failure to rule on the issue of the composition of the petit jury. (R1-33). The state filed no objections, and thereby waived any disagreement with the facts as determined by the Magistrate Judge. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. Unit B 1982). The District Judge summarily adopted the Magistrate's recommendations and dismissed the petition in July, 1988. (R1. 34). Circuit Judge Frank M. Johnson subsequently granted Mr. Hollis' *pro se* notice of appeal, (R1. 39), and the Eleventh Circuit, after briefing[3] and oral argument, issued its opinion in *Hollis v. Davis*, No 89-7477 (Sept. 18, 1991) (State Appendix A), in which it addressed only the jury composition issue. Finding that the petit jury that sentenced Mr. Hollis was unconstitutionally composed, and that Hollis could show cause and prejudice sufficient to overcome the procedural default caused by his trial attorney's failure to challenge the jury's composition, the Eleventh Circuit ordered the District Court to issue a writ of habeas corpus. (*Hollis*, AA 32-50) The state then filed its petition for writ of certiorari.

B. Statement of the Facts.

Thirty-three years ago, in 1959, the state of Alabama accused O. P. Hollis of committing first degree burglary

[3] Mr. Hollis' present counsel was appointed at this stage of these proceedings.

against a white man in rural Bullock County, Alabama. Bullock County was (and remains) majority black in population (*Hollis*, AA 41 n.11), yet blacks were systematically and totally excluded from the grand jury that indicted Mr. Hollis (*Recommendation* 6-8, 15-16) and from the petit jury that convicted him. (*Hollis 35-42; see also infra).* The record shows that, at the time of Mr. Hollis' indictment and conviction, the bench and bar of Bullock County regarded the constitutional rights of the county's black citizens with a callous disregard. At the evidentiary hearing below, the white judge who presided over Hollis' trial testified that in 1959, blacks in Bullock County were not allowed to serve on juries:

> Q: [Mr. Shinbaum[4]] Back in 1959 when juries, when the jury's venire was being assembled and the jury was being struck, do you know if it was illegal back then to strike blacks from the juries or to fail to include[5] them in the venires?
>
> A: [Former Circuit Judge Wallace[6]] No, I don't know, to tell you the truth.
>
> Q: Was that routinely done back then, as far as you can remember?
>
> A: It was, yes.

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[4] Mr. Shinbaum represented Mr. Hollis at the two evidentiary hearings.

[5] Judge Wallace's testimony, which was transcribed from an audio tape recording, says "exclude" rather than "include" – obviously a mistake, given the context of the question asked.

[6] Judge Wallace was the state judge who presided over Mr. Hollis' trial.

(1SR. 46) The testimony of Mr. Hollis' white defense counsel showed a similar institutional disdain for the rights of blacks in Bullock County in 1959:

> Q: [Mr. Shinbaum] Now . . . do you recall, back in 1959, a rough approximation of what percentage of the population in Bullock County was black?
>
> . . . .
>
> A: [Mr. Jinks[7]] I would say the percentage of blacks would be higher than the percentage of whites.
>
> . . . .
>
> Q: Okay. And at that time you don't recall any, of all those names that you recognized on the jury list, even, all of them were white persons?
>
> A: Yes, sir.
>
> Q: And you don't recall any blacks being on the petit jury venire?
>
> A: I don't recall any at that time.
>
> Q: Back in 1959 do you recall if there were any blacks that would have served on the grand jury venire?
>
> A: No, sir, I – I don't believe so at that time.

(1SR. 33-34)

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[7] Mr. Jinks was Mr. Hollis' defense attorney at Mr. Hollis' 1959 trial.

Q: [The Magistrate Judge] I think that, the sense I get is that there just were no blacks on juries in Bullock County back in '59.

A: [Mr. Jinks] I think you're right, Judge.

(1SR. 36)

Q: [Mr. Prude[8]] Back in 1959 when this case was tried do you know if it was illegal at that time for blacks to be excluded from the venire or from the jury?

A: [Mr. Jinks] Not that I recall that it was.

. . . .

Q: Okay. Was that routinely done in those days?

A: Yes.

. . . .

Q: [The Magistrate Judge] Routinely done, meaning the exclusion of blacks from the jury?

A: Yes, sir.

(1SR. 39-40).

Q: [The Magistrate Judge] Mr. Jinks, back in 1959 would you ever, in representing a criminal defendant, have filed a motion attacking the racial composition of the venire?

A: No, sir.

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[8] Mr. Prude is counsel for the state of Alabama.

Q: It just wasn't something that you or any other lawyer did at that time?

A: That's right.

(1SR. 32).

From this evidence, the Magistrate determined – without objection from the state – that the venire from which the grand jury that indicted Mr. Hollis was drawn was unconstitutionally composed.[9] (*Recommendation*, AC 10). But because he found this claim to have been procedurally defaulted, the Magistrate then turned to the two-pronged cause and prejudice test for overcoming such default. *Francis v. Henderson*, 425 U.S. 536, 543 (1976); *Wainwright v. Sykes*, 433 U.S. 72, 90-91, 97 (1977). Assuming ineffective assistance of counsel as cause for the procedural default, the Magistrate found that Mr. Hollis could not show prejudice:

> Assuming that petitioner's counsel had been able to prevail on his jury discrimination claim, petitioner's indictment would have been quashed. The petitioner, however, has offered no evidence that he would not have been reindicted. Therefore, all that a successful grand jury challenge would have done is delay the date of trial. Accordingly, the petitioner has not shown that he suffered any prejudice because he was indicted by an unconstitutionally composed grand jury.

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[9] As the Eleventh Circuit noted, because in 1959 grand and petit juries were selected from the same pools, Code of Ala. (1940) tit. 30, § 30, this finding means that the *petit* jury that convicted Mr. Hollis also was unconstitutional. (*Hollis*, AA 12).

(Recommendation, AC 18) (citations omitted). Accordingly, the Magistrate recommended that Mr. Hollis be granted no relief on the jury discrimination claim, and the District Court so ruled.

On appeal, the Eleventh Circuit took up *only* Mr. Hollis' jury discrimination claim, which it found to be valid. (*Hollis*, AA 9, 49). Blacks, the appellate court held, had been unconstitutionally excluded from both the grand *and petit* juries involved in Mr. Hollis' case. (*Id.* at 41). But for his attorney's procedural default of this issue, said the court, Mr. Hollis would be entitled to habeas relief. (*Id.* at 16). However, unlike the District Court, the Eleventh Circuit found that Mr. Hollis overcame this procedural default by showing both cause and prejudice. (*Id.*, 17-31 (cause), 32-49 (prejudice)).

As to cause, the appellate court found that the failure of Mr. Hollis' defense attorney to object to the systematic exclusion of blacks from the grand and petit jury venire deprived Mr. Hollis of his right to effective assistance of counsel. (*Id.* at 29, citing *Washington v. Strickland*, 46 U.S. 668 (1984) (two-part test for showing defense counsel was unconstitutionally ineffective)). This finding met *Sykes'* cause requirement. Its conclusion was valid, the Eleventh Circuit said, regardless of whether the defense attorney failed to make a timely objection to the jury's composition because he simply did not know that it was illegal to exclude blacks from the juries (*Id.* at 24-25), or, as the testimony from the evidentiary hearings indicated, he did not make the objection for fear of "community reaction or loss of practice." (*Id.* at 29-30).

The Eleventh Circuit then turned to the prejudice component of *Sykes*. Without a trial transcript, the court could not gauge the effect of the state's case on a theoretically unbiased petit jury, and it refused to charge the unavailability of the transcript to Mr. Hollis given his uncontested testimony, and the findings of the Magistrate (to which the state made no objection), that Mr. Hollis had filed *coram nobis* petitions in 1961, 1966, and 1972, and a motion specifically seeking a trial transcript in 1964. (*Id.* 46-47). Indeed, the court found compelling evidence that the state's inability to produce a transcript in response to Mr. Hollis' habeas petition was *not* the result of Mr. Hollis' delay in waiting until 1981 to file his first petition for federal habeas relief, but of the fact that the "*state and state court* appear to have ignored these early attempts to challenge his conviction and sentence at a time when the transcript likely could have been produced." (*Id.* at 47 (emphasis added)). Finally, the Eleventh Circuit found that, at least as to the 99-year sentence given Mr. Hollis by the petit jury, "[w]e would have far more confidence in a term of imprisonment selected by a jury containing members of the defendant's own race, particularly where the black defendant is on trial for an offense against a white person." (*Id.* at 48). For this reason, the court concluded that "at least as to sentencing, there is a probability of a different result, but for the unconstitutional jury selection, sufficient to undermine confidence in the outcome" of Mr. Hollis' trial. (*Id.* at 49). It is this holding that the state now asks this Court to renew upon a writ of certiorari to the Eleventh Circuit.

SUMMARY OF THE ARGUMENT

The state argues that because there is no trial transcript, the Eleventh Circuit could not evaluate the strength of the state's case at Mr. Hollis' trial in 1959. For the Eleventh Circuit to conclude that Mr. Hollis was prejudiced by his defense attorney's failure to make a timely objection to the systematic exclusion of blacks was, the state asserts, merely a presumption of prejudice. The state ignores the fact that blacks were systematically, purposely excluded from the jury venire in Bullock County. There can only be one purpose for excluding blacks from jury venires, and that purpose is to further discriminate against blacks when they appear before the jury. Consequently, there is a probability, sufficient to undermine confidence in the outcome of Mr. Hollis' trial, that if Mr. Hollis had been tried before a fairly composed, mixed-race jury, his sentence, imposed in the absence of a palpable intent to discriminate on the basis of race, would have been different. Moreover, the evidence shows that the state repeatedly failed to respond to Mr. Hollis' *pro se* attempts at post-conviction relief. Because of this failure to respond, the state itself is responsible for the lack of a transcript, and the Eleventh Circuit properly so held.

The second issue raised by the state is not appropriate for certiorari review. In addition, the state's failure to make an objection to the Magistrate's recommendation precludes it from now claiming that it cannot know whether Mr. Hollis' *pro se* petitions were actually filed, or what issues were raised on those petitions.

ARGUMENT

I. Whether, given the peculiar facts of this case, the Eleventh Circuit was correct in finding that Mr. Hollis had been prejudiced by his trial counsel's unreasonable error.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court defined the two-part cause and prejudice test for effective assistance of counsel. The state makes no challenge to the Eleventh Circuit's holding that the poor performance of Mr. Hollis' defense counsel satisfied *Strickland's* cause requirement. (*Hollis*, AA 17-25). The prejudice requirement, however, is central to the state's chief argument. (*State's Brief*, 7-15).

Prejudice, as defined by *Strickland*, means that counsel's failure to perform as the effective counsel required by the sixth amendment must have brought into doubt whether "a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Id.*, 466 U.S. at 91-92. Because in a given case an error by counsel is as likely to be "utterly harmless" as it is to be prejudicial, and because representing a client is an imprecise "art," a defendant who identifies error in his counsel's performance generally must "affirmatively prove prejudice," *id.*, 466 U.S. at 693 – that is, show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, 466 U.S. at 694. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome" of the trial. *Id.* 466 U.S. at 694. In meeting this burden, a defendant is *not* required to go so far as

showing that counsel's errors "more likely than not altered the outcome of the case." *Id.*, 466 U.S. at 694. As the *Strickland* Court cautioned, this search for actual prejudice is only the means to an end:

> Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id., 466 U.S. at 696. The facts of this case show that the result of Mr. Hollis' trial was unreliable, and that that unreliability was a product of a failure of the adversarial process. The jury that sentenced Mr. Hollis was composed by the state for the purpose of discriminating against blacks, and Mr. Hollis' defense attorney was restrained in his representation of Mr. Hollis by a fear that effectively representing Mr. Hollis would injure his legal career. These facts allow no conclusion but that fundamental fairness was lacking in Mr. Hollis' trial, and that the results obtained, particularly the sentence given Mr. Hollis, probably would have been different but for the unprofessional errors made by Mr. Hollis' attorney. Prejudice thereby is demonstrated.

According to the state, *Hollis* announces a new rule – one that it says "conflicts violently" with this Court's holding in *Strickland v. Washington* – by presuming prejudice sufficient for habeas relief in cases where a petitioner cannot make an "affirmative showing" of "actual prejudice." The state is mistaken. *Hollis* is a case essentially confined to its facts. It is little more than a relic from the past, a leftover injustice from a time and culture which (one hopes) no longer exists. Unless the state concedes that the facts that gave rise to *Hollis* are capable of repetition today, it has nothing to fear in the way of doctrinal innovation from the Eleventh Circuit's decision.[10]

As noted above, this case took place at a time – 1959 – and in a place – Bullock County, Alabama – where black was an unfortunate, and as *Hollis* shows, even dangerous, thing to be, especially if one were accused of a crime against a white man. The evidence below indicates that as an everyday matter in 1959 blacks were excluded from Bullock County's jury pools. This practice was sanctioned (at the very least) by the state until 1969, when then-District Judge Frank M. Johnson rendered *McNab v. Griswold*, CA No. 2653-N (M.D. Ala. Nov. 5, 1968), which held that blacks were unconstitutionally under-represented in

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[10] The state's petition to this Court perhaps reflects its concern not over *Hollis* but over *Ex parte Yelder*, 575 So. 2d 137 (Ala.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 273 (1991), in which the Alabama Supreme Court, following a *Strickland* analysis, held that counsel's unreasonable failure to make an objection under *Batson v. Kentucky*, 476 U.S. 79 (1986) to the state's use of peremptory challenges to strike 17 of 18 black jurors created a presumption of prejudice. *Yelder*, 575 So. 2d at 139.

Bullock County's jury pools and enjoined the state from continuing this discrimination. (*Recommendation*, AC at 7). If blacks were systematically, purposefully excluded from juries in the Bullock County of 1959, the obvious question is "why?" – what *was* the purpose behind this purposeful discrimination? The answer to this question is clear: the purpose was *to discriminate against blacks*, to "actually prejudice" the blacks who came before those grand and petit juries, including the unfortunate Mr. Hollis. There could be no other reason for such exclusion. Add to the foregoing analysis the fact that the trial judge and the defending attorney were ignorant of or unwilling to apply this Court's decisions forbidding the exclusion of blacks from juries, *e.g.*, *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Ex parte Virginia*, 100 U.S. 339 (1880), and it becomes apparent that the Eleventh Circuit could not have done otherwise than find that but for "counsel's unprofessional error" in failing to challenge the unconstitutional exclusion of blacks from the petit jury venire, "the results of the proceeding would have been different" – that is, Mr. Hollis would not have been sentenced by a jury from which blacks were excluded *in order that* they might be discriminated against. *See Strickland*, 466 U.S. at 694. *See also*, *Stephens v. Kemp*, 846 F.2d 642, 652 (11th Cir.), *cert. denied*, 488 U.S. 872 (1988) (based on counsel's failure to meet sixth amendment standard, court found prejudice where, but for counsel's omissions, "the result of the sentencing proceeding would have been different."); *Goodwin v. Balkcom*, 684 F.2d 794, 809, n.17, *cert. denied*, 460 U.S. 1098 (1983) (finding prejudice under similar facts *(dicta)*); *Huffman v. Wainwright*, 651 F.2d 347, 350 (5th Cir. Unit B July 20, 1981) ("Huffman was a black man

accused of raping a white woman. A mixed-race jury might clearly have had a special perception in a mixed-race case. . . . [D]epriving Huffman of the chance of having a mixed-race jury would seem to meet the prejudice requirement of relief."); *Alvord v. Wainwright*, 725 F.2d 1282, 1290 (11th Cir.), *cert. denied*, 469 U.S. 956 (1984).

A second point central to the state's first argument is the unavailability of a transcript from Mr. Hollis' trial. Without a transcript, the state argues, the Eleventh Circuit could not determine whether the unreasonable error committed by Mr. Hollis' defense attorney was prejudicial (*e.g.*, *State's Brief* at 11), and therefore could not, consistently with *Strickland*, hold that Mr. Hollis overcame the procedural default caused by his attorney's failure to object to the exclusion of blacks from the Bullock County venire. But the evidence is plain that the state, not Mr. Hollis, is responsible for the absence of a transcript. Mr. Hollis filed writs seeking post-judgment relief in 1962 and 1966, and he filed a motion explicitly seeking a transcript of his trial in 1964. (AC 11 n.5; *Hollis*, AA 13). The state never responded to these motions. If the state had made a timely and substantive response to these motions, a transcript of the trial would have been produced, and would subsequently have been available for the state to use in response to Mr. Hollis' habeas petition.

Even if Mr. Hollis' handwriting is, as the Magistrate called it, "inscrutable," his motions to the state court put the court on notice that he was making a post-conviction challenge to his incarceration. By 1963, Alabama had enacted a law that provided for the appointment of compensated counsel for post-conviction remedies, including

habeas corpus and *coram nobis*, "if necessary to assert or protect the right of the person" incarcerated. 1963 *Ala. Act* 526; *see Ala. Code* § 15-12-23 (1982). But no counsel ever was appointed to assist Mr. Hollis. Plainly, the state's refusal to respond directly and substantively to Mr. Hollis' *pro se* efforts to obtain post-conviction relief, or to appoint counsel (or an amanuensis) to assist him in that effort, cannot now be used offensively against Mr. Hollis by the state, as the state seeks to do. The state, not Mr. Hollis, is responsible for the absence of a transcript, and the state's present inability to show the strength of its case at trial against Mr. Hollis must be charged to the state itself. In so ruling, the Eleventh Circuit did not "carve out an exception to the *Strickland* requirement of prejudice" for convicted defendants whose defense lawyers fail to object to unconstitutionally composed juries. (*See State's Brief* at 13-15). The court merely let fall on the state the natural consequence of the state's willful and persistent efforts, so long ago, to deny every fundamental civil right to blacks such as Mr. Hollis.

However, even if a trial transcript were available, it would not provide a credible measure of the state's case against Mr. Hollis. Mr. Hollis' defense attorney testified at the evidentiary hearing that, even had he known that it was illegal to exclude blacks from juries in 1959, he would not have filed a motion attacking the all-white venire, implicitly because of his concern over the effect of such a challenge on his practice and community standing.

> Q: [The Magistrate Judge] [B]ack in 1959 would you ever, in representing a criminal defendant, have filed a motion attacking the racial composition of the venire?

A: [Mr. Jinks] No, sir.

Q: It just wasn't something that you or any other lawyer did at that time?

A: That's right.

(1 SR. 32).[11] In *Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir. 1982), *cert. denied*, 460 U.S. 1098 (1983), the Eleventh Circuit recognized that a defense attorney who entertained such concerns could not effectively represent his client:

> Admitted concerns over community ostracism do more than inhibit a lawyer's action at trial where his performance is visible by fellow citizens. An attitude such as this impairs the vitality of investigation, preparation, and representation that all clients deserve, indigent or otherwise. Fears of negative public reaction to the thought of representing an unpopular defendant surely hamper every facet of counsel's functions.

Balkcom, 684 F.2d at 806. Thus, a transcript of Mr. Hollis' trial could not be expected to show the state's case as it would have been shaped by vigorous advocacy, offered by a fully committed defense counsel who called defense witnesses, aggressively cross-examined state witnesses, and presented all possible alibi defenses. *At best*, a transcript of Mr. Hollis' trial would only show Mr. Hollis' defense attorney going through the motions of a defense – which could not helpfully guide the court in evaluating

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[11] Under *Strickland*, this showing that "an actual conflict of interest [between the defense attorney's duty to Mr. Hollis and his concern for his career] adversely affected his lawyer's performance" satisfies the prejudice requirement. *Strickland*, 466 U.S. at 692.

the actual strength of the state's case against Mr. Hollis in 1959. *See Strickland*, 466 U.S. at 685 ("Thus, a fair trial is one in which evidence *subject to adversarial testing* is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." (emphasis added)).

Hollis is based on facts not likely to recur. The Eleventh Circuit's decision is premised on those facts. Consequently, there is no reason why the Court should allow a deviation from normal appellate practice and grant the state's petition.

II. Whether, given the state's failure to respond to Mr. Hollis' pro se petitions for post judgment relief, the Eleventh Circuit was correct in holding the state responsible for its inability to produce a trial transcript.

The state's second reason for seeking certiorari review is to give the Court an opportunity to "consider extending the rule in *Norrell [v. Illinois*, 373 U.S. 420 (1963)] to instances involving Rule 9(A) cases." *State's Brief* at 19. This is not a reason for granting certiorari review. That the requested extension of *Norrell* did not occur by the normal stretch and growth of case law during the 29 years since *Norrell* was decided argues compellingly that there exists here no case "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court." Supreme Court Rule 11.

Moreover, the state waived the argument that it seeks to present to the Court. The state did not object to the Magistrate's recommended determination that

> [a]lthough [Mr. Hollis] has filed numerous petitions for writ of error coram nobis, none have apparently ever been decided by the state courts. In addition, there is no indication that the state circuit court has ever appointed counsel for [Mr. Hollis] in order to overcome the problem caused by [Mr. Hollis'] inscrutable handwriting.

(*Recommendation*, AC 8-9). Now, to this Court the state argues that because the circuit clerk did not have records of petitions filed by Mr. Hollis, the state can respond neither to the assertion that the petitions were filed, nor to the assertion that the petitions raised the same issues raised in Mr. Hollis' habeas petition. *State's Brief* at 17. The state's failure to object to that portion of the Magistrate's recommendation quoted above precludes it from questioning whether the petitions were filed. As to the issues presented in those petitions, the state makes a remarkable effort at bootstrapping: because the state failed to make timely responses to Mr. Hollis' petitions, it has no record of the issues raised in those petitions,[12] and now it asserts that, therefore, it cannot know what issues those petitions raised. *State's Brief* at 17. All that should

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[12] The state mistakenly says that there is no evidence that petitions were filed. *Compare State's Brief* at 17 *with Recommendation*, AC 11 n.5. (The Exhibits to the evidentiary hearing were lost, apparently by all parties as well as by one of the courts or clerks below.)

be taken from the state's argument is the measure of the state's refusal to accept responsibility for its mistakes 33 years ago. The state's second issue lacks merit, and provides no reason why the writ should be granted.

CONCLUSION

There is in the state's petition no "important question of federal law" that requires "immediate settlement in this Court." Supreme Court Rules 10.1, 11. The state has failed to show a reason why its petition should be granted, and Mr. Hollis has showed that it should not be granted.

Respectfully submitted on February 24, 1992.

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